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Supreme Court, U.S.
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No. 98-6322

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

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ANTONIO TONTON SLACK,

*Petitioner.*

v.

E. K. McDANIEL, Warden, Ely (Nevada) State Prison, and FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada,

*Respondents.*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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## BRIEF FOR RESPONDENTS

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## QUESTION PRESENTED

If a person's petition for habeas corpus under 28 U.S.C. §2254 is dismissed for failure to exhaust his state remedies and he subsequently exhausts his state remedies and refiles the §2254 petition, are claims included within that petition that were not included within his initial §2254 filing "second or successive" habeas applications?

## I. STATUTORY PROVISIONS INVOLVED

Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts.

(b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure to assert those grounds in a prior petition constituted an abuse of the writ.

## II. STATEMENT OF THE CASE

On December 29, 1989, an information was filed in the Eighth Judicial District Court of the State of Nevada in and for Clark County (hereinafter Clark County District Court or state trial court) charging Petitioner Antonio Slack (hereinafter Slack) with Murder With the Use of a Deadly Weapon. Court Record (CR) 16 Exh. 3. On February 22, 1990, Slack was convicted, pursuant to a jury verdict, of Second Degree Murder With the Use of a Deadly Weapon. CR 16 Exh. 12. On May 23, 1990, a judgment of conviction was entered upon the trial court's sentence of life with the possibility of parole for Second Degree Murder and a consecutive term of life with the possibility of parole for the use of a deadly weapon. CR 16 Exh. 13.



Slack appealed his conviction to the Nevada Supreme Court claiming there was insufficient evidence adduced at his trial to convict him; state law improperly allowed evidence of a sexual relationship between Slack and the twelve-year-old victim; that the reasonable doubt jury instruction given at his trial violated the due process clause of the United States and Nevada Constitutions; and that the state trial court erred by not adequately defining premeditation in the jury instructions. CR 16, Exh. 20.

The Nevada Supreme Court dismissed Slack's appeal in an unpublished order, concluding that the evidence of the intimate relationship of Slack and the victim was properly admitted to refute Slack's credibility after he denied having a boyfriend/girlfriend relationship with the victim. CR 16, Exh. 22.

On November 27, 1991, Slack filed a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254 by a Person in State Custody in the United States District Court for the District of Nevada. Joint Appendix (JA) 6-16. In that case, "his first federal petition", Slack raised the following issues: insufficient evidence was adduced at trial to convict him of Second Degree Murder; the state trial court improperly allowed prejudicial evidence of a sexual relationship between Slack and the twelve-year-old victim; the reasonable doubt instruction violated the

due process clause of the United States and Nevada constitutions; and the state trial court erred in not adequately defining premeditation in jury instructions regarding murder. *Id.*

Slack subsequently filed a motion to hold his first federal petition in abeyance so he could return to state courts and exhaust the following issues: ineffective assistance of counsel for failure to raise a *Franklin* violation in that the deal made with his co-defendant was not completed before he testified and for failure to offer and/or request an accomplice or informant instruction; the state trial court erred in not instructing the jury on an accomplice instruction and his testimony; the state trial court erred in allowing his co-defendant to testify prior to his deal with the State being completed; and prosecutorial misconduct, in that the prosecution withheld from the jury the fact that the only fingerprints found on the murder weapon were those of the co-defendants. JA 17-19.[1] On February 19, 1992, Slack's first federal petition was dismissed without prejudice so that he could exhaust his state remedies. JA 21-22.

[1] In *Franklin v. State*, 577 P.2d 860 (Nev. 1978), the Nevada Supreme Court held that plea negotiations with a testifying co-defendant had to be fully consummated before that co-defendant could testify. The court later overturned its ruling in *Franklin*. *Sheriff v. Acuna*, 819 P.2d 197 (Nev. 1991).



On July 10, 1992, Slack filed a petition for post-conviction relief in the Clark County District Court. CR 16, Exh. 31. In his petition, Slack claimed as ground one that he was denied the effective assistance of counsel at pre-trial and trial in that his counsel: 1) failed to find out what kind of deal was made with co-defendant Kamal Bey; 2) failed to file a pre-trial motion in limine to stop the introduction of prior evidence regarding his sexual relationship with the victim; 3) failed to file a pre-trial motion in limine to stop the testimony of Kamal Bey, as Bey's deal with the prosecution was contingent on his trial testimony; 4) failed to interview Slack's brother to refute the testimony of Kamal Bey; 5) failed to ask Kamal Bey what deals he made with the state for his testimony; 6) failed to request an accomplice instruction; 7) failed to have evidence presented to the jury that the only fingerprints found on the murder weapon were those of Kamal Bey; and 8) that these alleged errors prejudiced him. *Id.*

As ground two, Slack claimed that he had ineffective assistance of counsel on his direct appeal in that his appellate counsel: 1) failed to raise a *Franklin* violation on appeal; 2) failed to raise the issue that counsel failed to request an accomplice instruction; 3) failed to raise the issue that Kamal Bey was a co-defendant and his testimony was questionable; and 4) failed to raise an issue of prosecutorial misconduct when

the prosecutor failed to inform the jury that Kamal Bey was a co-defendant as well as the fact that Bey's fingerprints were the only fingerprints found on the murder weapon. *Id.*

As ground three, Slack claimed that the state trial court deprived him of his rights under the Sixth and Fourteenth Amendments to a fair and impartial trial when the court failed to properly instruct the jury on accomplice testimony and premeditation. *Id.* As ground four, Slack claimed that the prosecutor committed misconduct by withholding evidence from the jury that the only fingerprints found on the murder weapon were those of Kamal Bey and that he was a co-defendant in the case. *Id.*

On February 11, 1993, the state trial court denied Slack's petition for post-conviction relief. JA 24-30. Slack appealed and on December 30, 1993, the Nevada Supreme Court dismissed his appeal. JA 31-34. The Nevada Supreme Court found that Slack's claims were repelled by the record. Specifically, the Nevada Supreme Court found the terms of the state's agreement with Bey were fully disclosed to the jury. The Court found that Slack's theory of the case was that he accidentally shot the victim and noted that Slack testified that his finger was on the trigger when the gun fired, therefore it was irrelevant that Bey's fingerprints were found on the weapon. The Nevada Supreme Court also found that Bey was neither an



accomplice nor a co-defendant and Slack was not prejudiced by the lack of an accomplice testimony instruction. The Court also noted that the remaining claims were similarly repelled by the record. *Id.*

On May 30, 1995, Slack filed his second federal petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. JA 35-47. The federal district court subsequently appointed counsel for Slack who submitted a third amended petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. JA 64-65 & 66-91.

In his third amended petition (hereinafter third amended petition) Slack alleged the following grounds for relief: 1) Insufficient evidence was adduced at trial to support a conviction for the crime of second degree murder in violation of the Fifth and Fourteenth Amendments to the United States Constitution; 2) Petitioner was denied his right to due process under the Fifth and Fourteenth Amendments because he was charged with "open murder" in an information which did not properly plead each element of first degree murder thus failing to impart sufficient notice to him; 3) The defendant's right to a fair trial was destroyed by the introduction of evidence of sexual misconduct designed to prejudice the jury in violation of the Fifth and Fourteenth Amendments to the United States Constitution; 4) The trial court failed to properly instruct the jury in violation of the Fifth and Fourteenth Amendments to the

U.S. Constitution;[2] 5) Petitioner was denied the effective assistance of trial counsel in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution;[3] 6) Petitioner was denied the effective assistance of appellate counsel in violation of the Sixth Amendment;[4] 7) The doctrine of cumulative error mandates relief. JA 66-91.

Respondents moved to dismiss Slack's third amended petition, alleging that grounds two, three, four(c), five, six and seven were unexhausted. JA 99-103. Respondents also argued that grounds two, four(c), five, six and seven were not raised in Slack's first federal petition and constituted an abuse of the writ pursuant to *Farmer v. McDaniel*, 98 F.3d 1548 (1996) *cert. denied* 520 U.S. 1188 (1997). JA 103-110. The federal district court found that Respondents had met their burden in pleading abuse of the writ and that Slack had to demonstrate either cause and prejudice for failing to raise grounds two, four(c), five, six and seven in his prior federal petition, or demonstrate that a fundamental miscarriage of justice would occur if these claims were dismissed for abuse of the writ. JA 143.

Rather than attempt to overcome the abuse of the writ bar, Slack filed a motion for reconsideration arguing that he had not abused the writ. JA 145-150. The federal district court disagreed and dismissed grounds two, four(c), five, six and seven as abusive. JA 155-156. The federal district court also found that ground three of Slack's petition was unexhausted and therefore dismissed his petition. JA 157-158. The federal district court gave Slack the option of reopening the proceeding and abandoning his claim in ground three if he wished to continue in federal court with the remaining exhausted claims. JA 158-159.

Rather than proceed with his remaining exhausted claims only, Slack filed a notice of appeal. Both the district court and the circuit court denied Slack's request for a certificate of probable cause. JA 161, 182-183, & 197. This Court granted certiorari on February 22, 1999.

## III. SUMMARY OF ARGUMENT

In *Rose v. Lundy*, 455 U.S. 509 (1982), this Court set forth the requirement that a state prisoner filing a petition for

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[2] In ground four, Slack challenged the instructions given on reasonable doubt, premeditation and deliberation, and malice aforethought. Slack's challenge to the malice aforethought instruction is the part of ground four that was subsequently dismissed as abusive.

[3] Slack alleged his trial counsel was ineffective for: a) failing to take any action to prevent the introduction of evidence of sexual contact between Slack and his twelve year old victim; b) failure to object to the jury instruction on reasonable doubt; c) failure to object to the jury instruction on premeditation and deliberation; d) failure to object to the jury instruction on malice aforethought; and e) failure to investigate the facts of the case and develop available defenses.

[4] Slack alleged his appellate counsel was ineffective for: 1) failing to raise on direct appeal that his information did not sufficiently notify him of the charges and failing to challenge the malice aforethought instruction; and 2) for conceding at oral argument two of the four issues raised in his appeal.

writ of habeas corpus pursuant to 28 U.S.C. §2254 in federal district court must have fully exhausted his state court remedies for all claims contained in the federal petition. If the petition contains exhausted and unexhausted claims, the petition must be dismissed in order for the prisoner to exhaust his state court remedies. *Id.* at 522. However, there is nothing in this Court's opinion in *Rose* which supports the proposition that a state prisoner is entitled to multiple dismissals without prejudice when he returns to federal court with new unexhausted claims despite a previous dismissal without prejudice, granted for the purpose of allowing the petitioner to fully exhaust state court remedies.

In this case, Slack obtained one dismissal without prejudice to return to state court and exhaust several claims which he presented to the federal district court in his motion to hold his first federal petition in abeyance. JA 17-19, 21-22. Once he returned to federal court and initiated his second federal proceeding, Slack, through his attorney, raised five brand new, unexhausted claims. These claims were not presented in Slack's prior federal petition or in the state court proceedings which followed the dismissal of the first federal petition without prejudice. *See* JA 6-19, CR 16 Exh. 31. Slack's failure to raise these claims in his first federal petition constitutes an abuse of the writ.



In *Sanders v. United States*, 373 U.S. 1 (1963), this Court made it clear that a prior adjudication on the merits was not necessary before the doctrine of abuse of the writ could be applied. *Sanders* involved a second motion by a federal prisoner pursuant to 28 U.S.C. §2255. The lower federal court dismissed Sanders' motion for failing to raise his claims in his first motion despite the fact that the first motion was not denied on the merits. This Court reversed and remanded for an evidentiary hearing and stated that the respondents were free to raise the defense of abuse. *Sanders* at 21. This defense was available to the respondents even though this Court specifically found that Sanders' prior motion was not determined on the merits. *Sanders* at 19.

Rule 9(b) of the Rules Governing Section 2254 Cases in United States District Courts states:

> (b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure to assert those grounds in a prior petition constituted an abuse of the writ.

Rule 9(b) codified this Court's reasoning in *Sanders*. Habeas Corpus Rule Advisory Committee Notes, 28 U.S.C.A.

foll. §2254, at 800. Pursuant to the express terms of the rule and this Court's holding in *Sanders*, a second petition containing new grounds does not need to follow a prior petition that was determined on the merits in order to constitute an abuse of the writ. The only requirements for such a petition are: 1) new and different grounds are alleged; and 2) the failure to assert those grounds in a prior petition constituted an abuse of the writ. *See Farmer v. McDaniel*, 98 F.3d 1548 (1996), *cert. denied* 520 U.S. 1188 (1997).

The Ninth Circuit in *Farmer* held that a prior adjudication on the merits was not a prerequisite to the application of the doctrine of abuse of the writ. *Id.*. at 1557. The Ninth Circuit based its decision on the plain wording of Rule 9(b), this Court's opinion in *Sanders* and the Advisory Committee Notes to Rule 9(b). *Id.* at 1555-1556. The *Farmer* decision reached a result well within the formal, judicial and rules-based doctrines of law governing federal habeas corpus proceedings. *See Lonchar v. Thomas*, 517 U.S. 314 (1996).

The application of the abuse of the writ doctrine to new claims, regardless of whether a prior petition was adjudicated on the merits, is consistent with the principle that a habeas petitioner may not engage in piecemeal litigation. *See Rose v. Lundy*, 455 U.S. 509, 520 (1982). State respondents should not be required to appear in federal court time and again only



to have serial federal petitions dismissed for failure to exhaust state court remedies. The decision of the federal district court below should be affirmed by this Court.

## IV. ARGUMENT

### THE FEDERAL DISTRICT COURT PROPERLY DISMISSED SLACK'S NEW CLAIMS AS ABUSIVE

#### A. The Dismissal of Slack's New Claims as Abusive is Consistent with the Principles Underlying the Exhaustion Requirement in Federal Habeas Corpus Practice.

In his opening brief Slack argues that the exhaustion requirement governing federal habeas petitions under 28 U.S.C. §2254, set forth in this Court's decision in *Rose v. Lundy*, 455 U.S. 509 (1982), is designed solely to channel claims in the first instance into the state courts to ensure that state courts have the first opportunity to consider them. According to Slack a "doctrine intended to encourage petitioners to conduct thorough exhaustion proceedings simply cannot be advanced by precluding federal consideration of the claims which are exhausted." (Opening Brief, pg. 14-15).

Slack's argument ignores the fact that this case does not deal with the preclusion of properly exhausted claims. *O'Sullivan v. Boerckel*, __ U.S. __, __ S.Ct. __ (No. 97-2048, June 7, 1999). After one dismissal without prejudice, designed to allow Slack to fully exhaust state court remedies,

he returned to federal court and raised five unexhausted claims that had never appeared in any of his prior federal or state challenges to his conviction.[5] *See* JA 6-19, 66-91, CR 16 Exhs. 20 & 31.

In *Rose*, this Court set forth the principles underlying the exhaustion requirement:

> A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional issues. . . . Equally as important, federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review. *Cf.* 28 U.S.C. §2254(d) (requiring a federal court reviewing a habeas petition to presume as correct factual findings made by a state court). . . .
>
> Rather than increasing the burden on federal courts, strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition. To the extent that the exhaustion requirement reduces piecemeal litigation, both the courts and the prisoners should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review.

*Rose v. Lundy*, 455 U.S. 509, 518-520 (1982).

The exhaustion requirement is not a rule of preclusion. However, it does set forth strict procedures a petitioner must follow prior to proceeding in federal court. Slack did not follow those procedures. Instead, Slack obtained a dismissal without prejudice to exhaust his state remedies and, rather than fully exhausting state remedies, he returned to federal court with new unexhausted claims. The exhaustion requirement does not grant petitioners the right to as many dismissals without prejudice as they wish. Indeed, such a result would enable petitioners to ping-pong back and forth between state and federal court *ad infinitum,* thereby increasing piecemeal litigation rather than reducing it. Nothing in *Rose* or any of the other exhaustion cases cited by Slack supports such a result.

Slack also argues that under the exhaustion requirement, federal courts have only two options: to either dismiss the petition without prejudice, or to adjudicate the

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[5] The question framed by this Court seems to indicate a belief that the claims dismissed as abusive were exhausted. That is not the case. Slack did not return to state court and exhaust the claims in grounds two, four(c), five, six and seven. In fact, these claims did not appear in any of Slack's challenges to his conviction until his appointed counsel filed his amended petition in his second federal proceeding. *See* JA 6-19, 35-48, 66-91, CR 16 Exhibits 20 & 31. Respondents noted this circumstance in their response to Slack's Petition for Writ of Certiorari. (Brief of Respondents in Opposition to the Petition for a Writ of Certiorari, pg. 8).

claims on the merits. Slack's argument is incorrect. Simply because claims are unexhausted does not mean that federal courts may not apply other affirmative defenses to those claims. For example, a petition may contain unexhausted claims but also be a delayed petition under Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts. If the state respondents are able to demonstrate prejudice in fashioning a response, the federal court would be free to dismiss the petition under Rule 9(a). Indeed, dismissing such a petition without prejudice to exhaust state remedies and then allowing a return to federal court so that the claims may then be dismissed under Rule 9(a) would be absurd.

Slack has cited no authority, and Respondents are unaware of any, which requires a federal court to disregard or delay the application of an affirmative defense which would preclude either certain claims or the entire petition, simply because the claims in question are unexhausted. Such a practice would create unnecessary piecemeal litigation.

Slack, citing caselaw regarding FRCP 41(a), argues that a dismissal without prejudice does not operate as an adjudication on the merits and thus does not have res judicata



effect.[6] FRCP 41(a) provides that a plaintiff may voluntarily dismiss an action without prejudice prior to the time of service on an adverse party or before an adverse party has filed an answer. This Court has made it clear that a plaintiff is only entitled to one dismissal without prejudice under FRCP 41(a). *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1990). In *Cooter & Gell*, this Court noted that FRCP 41(a) was designed to curb abuses of procedural rules which allowed dismissals or nonsuits right up to the entry of the verdict and to eliminate the practice of summoning the defendant in to court in successive actions. *Id.* This is exactly what the district court's application of Rule 9(b) to Slack's new claims accomplishes. Respondents should not be required to return to federal court time and again only to have the petition dismissed without prejudice for failure to exhaust state remedies.

Slack argues that the application of the abuse of the writ rule to his new claims violates due process because he did not have an opportunity to litigate his claims in his first federal habeas petition since they would have been unexhausted. However, Slack could have raised these claims in his first federal proceeding and returned to state court to exhaust them

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[6] Slack cites FRCP 41(b) in his brief. (Opening brief, pg. 20). This is apparently a typographical error since the case cited by Slack discusses FRCP 41(a), the rule that concerns dismissals without prejudice.

just as he did with his other claims. Additionally, Slack could not litigate his abusive claims in his second federal petition because they were unexhausted. *O'Sullivan.*

According to Slack, the answer to the question posed by this Court is that where a person's petition for habeas corpus under 28 U.S.C. §2254 is dismissed for failure to exhaust state remedies, and he subsequently exhausts his state remedies and refiles the §2254 petition, the earlier "without prejudice" dismissal can have no preclusive effect. The key words in this Court's question are "*subsequently exhausts his state remedies*". Slack did not exhaust the claims the district court dismissed as abusive. Under Slack's argument he would be entitled to another dismissal without prejudice to return to state court to exhaust his state remedies. Slack's view would result in his return to the state courts and, presumably, a third separate filing in federal court. At that time, if he raised even more unexhausted claims, under Slack's logic he would apparently be entitled to a third dismissal without prejudice. In short, under the rule championed by Slack and his supporting amici curiae, he would be allowed to hail the State of Nevada into federal court numerous times with impunity.

Such a result strikes at the very object of criminal law, the finality of its judgments. *See McClesky v. Zant*, 499 U.S. 467, 491 (1991). It also places an even heavier "burden on



scarce federal judicial resources and threatens the capacity of the system to resolve primary disputes." *Id*

It does not violate due process to require a habeas petitioner to raise all claims in an initial federal petition even if it is dismissed without prejudice to exhaust state remedies. If a petitioner subsequently discovers new claims, which could not have been discovered previously and raised during subsequent state court proceedings, he will have the opportunity to demonstrate to the federal courts cause and prejudice to overcome the abuse of the writ bar. Any other rule would allow a habeas petitioner to ping-pong back and forth between state and federal court by simply obtaining serial dismissals without prejudice to exhaust state remedies.[7] Such a result has no support in the law and should not be countenanced by this Court.

**B. The Application of the Abuse of the Writ Doctrine Does Not Require a Prior Adjudication on the Merits.**

Slack argues that the abuse of the writ doctrine cannot be applied to Slack's new claims because his prior federal petition was not determined on the merits. According to Slack, because the doctrine of res judicata requires a prior

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[7] Serial dismissals without prejudice are more frequent in capital cases where the petitioner has more of an incentive to delay the disposition of his sentence. However, such dismissals are a serious drain on the resources of both the Respondent and the courts, even in noncapital cases. The *Farmer* rule solves this problem in both capital and noncapital cases.

adjudication on the merits in order to preclude a subsequent action, the abuse of the writ doctrine must require a prior determination on the merits. Therefore, Slack argues, there is a bright line rule that gives preclusive effect to a prior federal adjudication as opposed to a prior dismissal without prejudice. Slack's argument ignores the fact that "[r]es judicata as such does not apply in habeas proceedings..." *Hill v. Lockhart*, 877 F.2d 698 (8th Cir. 1989) *aff'd on rehearing* 894 F.2d 1009 (8th Cir. 1990). Rather, the abuse of the writ doctrine is a qualified application of the doctrine of res judicata. *See McCleskey v. Zant*, 499 U.S. 467, 487 (1991).

Slack's argument also does not take into account this Court's decision in *Sanders v. U. S.*, 373 U.S. 1 (1963). In *Sanders*, the petitioner filed a motion under 28 U.S.C. §2255 challenging his sentence but alleging bare conclusions with no supporting facts. The federal district court denied the motion on the ground that it set forth no facts to support the conclusions. Sanders then filed a second motion, this time alleging specific facts. The federal district court denied the second motion without a hearing because the petitioner did not raise his factual allegations in his first motion. *Sanders* at 5-6. This Court reversed, holding that the statute required a hearing on a motion which alleges sufficient facts to support a claim for relief.



This Court first discussed the development of caselaw governing successive applications and then distinguished between successive motions on grounds previously heard and determined, and successive applications claimed to be an abuse of remedy. *Id.* at 15-17. As for successive motions on grounds previously determined this Court stated:

> Controlling weight may be given to denial of a prior application for federal habeas corpus or §2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. . . .
>
> (2) The prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application *See Hobbs v. Pepersack*, 301 F.2d 875 (C.A. 4th Cir., 1962). This means that if factual issues were raised in the prior application, and it was not denied on the basis that the files and records conclusively resolved these issues, an evidentiary hearing was held. *See Motley v. United States*, 230 F.2d 110 (C.A. 5th Cir., 1956); *Halloween v. United States*, 197 F.2d 926 (C.A. 5th Cir., 1952).
>
> (3) Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground.

*Sanders* at 15-16.

As for successive applications claimed to be an abuse of the remedy, this Court stated:

> No matter how many prior applications for federal collateral relief a prisoner has made, the principle elaborated in Subpart A, supra, cannot apply if a different ground is presented by the new application. So too, it cannot apply if the same ground was earlier presented but not adjudicated on the merits. In either case, full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government has the burden of pleading.

*Id.* at 17.

Therefore, in *Sanders*, this Court made a clear distinction between successive petitions following a petition that was determined on the merits and successive petitions following a petition that was not determined on the merits. It was the latter petition which was subject to the abuse of the writ bar. This is further supported by this Court's application of the foregoing principle to *Sanders* case:

> Petitioner's first motion under §2255 was denied because it stated only bald legal conclusions with no supporting factual allegations. The court had the power to deny the motion on this ground, see *Wilkins v. United States*, 103 U.S.App.D.C. 322, 258 F.2d 416 (1958), although the better course might have been



> to direct petitioner to amend his motion, see *Stephens v. United States*, 246 F.2d 607 (C.A. 1[0th] Cir., 1957) (per curiam). But the denial, thus based, was not on the merits. It was merely a ruling that petitioner's pleading was deficient. . . .
>
> On remand, a hearing will be required. . . . Also it will be open to the respondent to attempt to show that petitioner's failure to claim mental incompetency in his first motion was an abuse of the motion remedy, within the principles of *Wong Doo* and *Price v. Johnston*, disentitling him to a hearing on the merits.

*Sanders* at 19-21.

This Court's opinion in *Sanders* makes it clear that a prior adjudication on the merits is not necessary for a finding that new claims raised in a successive petition constitute an abuse of the writ.

This Court's reasoning in *Sanders* was codified in Rule 9(b). The Advisory Committee Notes to Rule 9(b) state:

> Subdivision (b) deals with the problem of successive habeas petitions. It provides that the judge may dismiss a second or successive petition (1) if it fails to allege new or different grounds for relief or (2) if new or different grounds for relief are alleged and the judge finds the failure of the petitioner to assert those grounds in a prior petition is inexcusable. . . .

With reference to a successive application asserting a new ground or one not previously decided on the merits, the Court in *Sanders* noted:

> In either case, full consideration of the merits can be avoided only if there has been an abuse of the writ . . . and this the Government has the burden of pleading. . .
>
> Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application . . . he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.

373 U.S. at 17-18.

> Subdivision (b) has incorporated this principle and requires that the judge find petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable.

Habeas Corpus Rule, Advisory Committee Notes, 28 U.S.C.A. foll. §2254, at 799-800.

Both *Sanders* and the Advisory Committee Notes confirm that when new claims are alleged in a second petition, a prior adjudication on the merits is not necessary for a finding of abuse of the writ.

Further, even under the doctrine of res judicata a litigant was not entitled to conduct his case in a piecemeal fashion:

> "[A] party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a



> judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible."

*Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 320 (1927), quoting *Stark v. Starr*, 94 U.S. 477, 485 (1876).

In this case, Slack presented challenges to his conviction in a piecemeal manner. The presentation of brand new, unexhausted claims in Slack's third amended federal habeas petition merely creates additional litigation. Requiring Respondents to appear and respond in a second federal proceeding only to have that proceeding dismissed without prejudice for a second time due to unexhausted claims strikes at the finality of state convictions and constitutes an abuse of the writ.

Slack next cites this Court's decision in *Stewart v. Martinez-Villareal*, ___ U.S. ___, 118 S.Ct. 1618 (1998), in support of his argument. In *Martinez-Villareal*, this Court stated that the petitioner's claim, under *Ford v. Wainwright*, 477 U.S. 399 (1986), that he was incompetent to be executed, could be raised in a second and successive petition because it was not ripe for adjudication when it was raised in a prior petition.

In *Martinez-Villareal*, this Court stated:

> Later, in *Rose v. Lundy*, 455 U.S. 509, 522, 71 L.Ed.2d 379, 102 S.Ct. 1198 (1982), we went further and held that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." But none of our cases expounding this doctrine have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition.

*Martinez-Villareal* at 1622.

In this case, Slack's first federal petition was dismissed in order for him to exhaust state remedies. Slack returned to state courts and raised the claims he had pleaded in his first federal petition. Slack then returned to federal court and through his attorneys, filed an amended successive petition raising brand new, unexhausted grounds. It was Slack's new, unexhausted grounds which the federal district court properly found constituted an abuse of the writ pursuant to Rule 9(b).

The facts of this case are materially different from the facts of the *Martinez-Villareal* case. The holding in *Martinez-Villareal* was based on the temporal relationship of petitioner's mental capacity to be executed vis-a-vis the time he filed his



successive petition. This Court's opinion in *Martinez-Villareal* simply does not apply to Slack's case. There is nothing in this Court's opinion in *Martinez-Villareal* which suggests that a federal court may disregard this Court's opinion in *Sanders v. United States*, 373 U.S. 1 (1963) and the dictates of Rule 9(b), and allow a petitioner to ping-pong back and forth between federal and state courts constantly raising new unexhausted claims which were readily available when he first appeared in federal court.

**C. The Caselaw Cited by Slack does not Demonstrate that a Prior Adjudication on the Merits is Necessary for a Finding of Abuse Under Rule 9(b).**

Slack argues that lower courts outside the Ninth Circuit have uniformly held that no application filed after an earlier dismissal without prejudice can be second or successive and therefore abusive under Rule 9(b). Slack has split his analysis between cases decided prior to the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) and cases decided after the enactment of the AEDPA.

Slack first points to the Fifth Circuit's decision in *Woods v. Whitley*, 933 F.2d 321 (5th Cir. 1991). *Woods* involved an abuse of the writ analysis regarding the petitioner's third federal habeas petition. Woods' first federal petition was dismissed for failure to exhaust state remedies

and the second federal petition was decided on the merits. *Woods* at 322. Apparently, Woods returned to federal court with fully exhausted claims in his second petition. Woods third federal petition was denied as an abuse of the writ. *Woods* at 324-325.

Slack next cites *Hill v. Lockhart*, 894 F.2d 1009 (8th Cir. 1990), stating the Eighth Circuit focused on the lack of a prior federal adjudication in holding that the district court did not abuse its discretion in hearing Hill's second federal petition. However, Hill's second federal petition contained the same claims as his first federal petition. *Hill v. Lockhart*, 877 F.2d 698, 702 (8th Cir. 1989), *aff'd on rehearing* 894 F.2d 1009 (8th Cir. 1990) *cert. denied* 497 U.S. 1011 (1990). Therefore, the first clause of Rule 9(b), which requires a prior determination on the merits, applied in that case. There is no similar requirement in the second clause of Rule 9(b) for a finding of abuse.

Slack then cites *Dellenbach v. Hanks*, 76 F.3d 820 (7th Cir. 1996) *cert. denied* 519 U.S. 894 (1996). However, *Dellenbach* involved an analysis under former 28 U.S.C. §2244(a) & (b), and an instance where the district court had summarily dismissed the habeas petition. The Seventh Circuit's analysis turned on the express language of former 28 U.S.C. §2244(a) and did not even mention Rule 9(b). Not one



of these cases is on point with this case. None involved a first federal petition that was dismissed to allow complete exhaustion and then, a subsequent filing of an amended petition with brand new, unexhausted grounds.

Slack also lists the following cases in support of his argument: *In re Wilson*, 142 F.3d 939 (6th Cir. 1998); *McWilliams v. State of Colorado*, 121 F.3d 573 (10th Cir. 1997); *In re Gasery*, 116 F.3d 1051 (5th Cir. 1997); *Christy v. Horn*, 115 F.3d 201 (3rd Cir. 1997); *Benton v. Washington*, 106 F.3d 162 (7th Cir. 1996); *In re Turner*, 101 F.3d 1323 (9th Cir. 1997); *Dickinson v. Maine*, 101 F.3d 791 (1st Cir. 1996); and *Camarano v. Irvin*, 98 F.3d 44 (2nd Cir. 1996). These cases do not contain an abuse of the writ analysis. In every one of these cases, the courts analyzed 28 U.S.C. §2244 as amended by AEDPA, to determine whether a petitioner must request permission from the circuit court before filing a second petition in federal district court, when the first petition was dismissed without prejudice. In addition, in every one of these cases the petitioner apparently returned with the same claims which had been exhausted following a dismissal without prejudice.

Slack extensively discusses *Camarano v. Irvin*, 98 F.3d 46 (2d Cir. 1996). According to Slack the government in *Camarano* had urged a construction of "second or successive

application" that would have limited the habeas petitioner to those claims contained in the initial habeas corpus petition which had been dismissed without prejudice. (Opening Brief, pg. 33.) This is an inaccurate description of *Camarano*.

In *Camarano*, the petitioner's first federal petition was dismissed without prejudice to exhaust state remedies. Camarano subsequently exhausted his state remedies and moved the Second Circuit for permission to file a second or successive petition under the AEDPA. There is no indication in the *Camarano* decision that the second petition contained new claims or unexhausted claims. *Id.* at 45. The government urged the Second Circuit to interpret the new AEDPA provisions, codified at 28 U.S.C. §2244, to bar a habeas petitioner from repeating *any* claims, even if previously unexhausted. *Id.* at 46. In other words, the government was arguing that a second federal petition should not be allowed even if the second petition contained exactly the same claims as the first, albeit ones which later became fully exhausted. That is not the case with Slack. Respondents never argued below that any of the claims Slack raised in his first federal petition or in his motion to hold his petition in abeyance were abusive and the district court did not hold that they were. The only claims in Slack's petition that were held to be abusive



were the brand new unexhausted claims. *Camarano* does not support Slack's position.

**D. The Decision Below and the Ninth Circuit's decision in *Farmer* does not Lead to Absurd and Unconstitutional Results.**

Slack also argues that the Ninth Circuit based its decision in *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996) *cert. denied* 520 U.S. 1188 (1997) on a narrow and distorted parsing of Rule 9(b). On the contrary, the Ninth Circuit's analysis of Rule 9(b) was in accord with this Court's decision in *Sanders v. United States*, 373 U.S. 1 (1963) and the Advisory Committee Notes to Rule 9(b). The Ninth Circuit in *Farmer* reached a result well within the formal judicial, statutory, and rules-based doctrines of law governing federal habeas corpus proceedings. *See Lonchar v. Thomas*, 517 U.S. 314, 322 (1996).

As pointed out above, *Sanders* distinguished between successive petition filed after a determination of a prior petition on the merits and a subsequent petition when there had not been a prior determination on the merits. *Sanders* explicitly stated that abuse of the writ defense was available when there was no prior determination on the merits. *Sanders* at 17. Rule 9(b) was based upon this Court's decision in *Sanders* and sets forth no requirement of a prior adjudication

on the merits for a successive petition to constitute abuse of the writ.

In *Farmer*, the Ninth Circuit stated:

> Farmer says that Rule 9(b)'s reference to "second or successive petition" incorporates the concept of a prior merits determination into both clauses. But reading the Rule in this way would render the requirement in the first clause that "the prior determination was on the merits" redundant. We have difficulty reading the second clause as if it, too, includes a requirement that the prior petition (which did not include the grounds alleged in the subsequent petition) be a "prior determination on the merits." Literally, dismissal under this prong may occur if only two things are found: (1) new and different grounds are alleged and (2) the failure to assert those grounds in a prior petition constituted an abuse of the writ. Had Congress intended to limit the bases for dismissal of "new and different" grounds other than by what constitutes an abuse of the writ, it could have done so either by making the entire Rule applicable only if "the prior determination was on the merits" or by adding the phrase "determined on the merits" after the words "prior petition." Given how it is actually written, we cannot say that Rule 9(b) itself requires the prior petition that triggers abuse of the writ analysis to be one that was resolved on the merits. . . .
>
> Although Farmer correctly argues that a habeas petitioner may not be deprived of a hearing on the merits of his first federal habeas case for "equitable" reasons not founded in statute, rule and precedent, *Lonchar v. Thomas*, __ U.S. __, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996), he offers no grammatically sensible way that Rule 9(b) can be read to treat the first prong—providing for dismissal for failing to allege "new and different grounds" when the prior determination was on the merits—the same as the second prong—providing for dismissal for alleging "new and different grounds" when failing to do so in a prior petition was abusive.



*Farmer* at 1555-1556.

The *Farmer* court correctly determined that Rule 9(b) contains two separate and distinct clauses referring to two separate situations. One requires a prior decision on the merits and the other one does not. The ruling in *Farmer* is consistent with settled rules of statutory construction. Rule 9(b) states in its entirety:

> (b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure to assert those grounds in a prior petition constituted an abuse of the writ.

The phrase "and the prior determination was on the merits" clearly modifies the phrase immediately proceeding it: "a second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief."

This reading of Rule 9(b) is also consistent with "the fundamental canon of statutory construction that a qualifying phrase refers solely to its immediate antecedent." *National Coalition for Students with Disabilities Educ. and Legal Defense Fund v. Allen*, 152 F.3d 283, 288, n.6 (4th Cir. 1998); *see also, Anhydrides & Chemicals, Inc. v. The United States*, 130 F.3d 1481, 1483 (Fed. Cir. 1997); 2A Sutherland Statutory Construction §47.33 (5th ed. 1992).

Slack attempts to explain why the phrase "and the prior determination was on the merits" is not included in the second clause of Rule 9(b), by arguing that it was unnecessary. According to Slack, since the second clause refers to new or different claims, obviously they would not have been the subject of a previous adjudication and there would be no reason to refer to a previous adjudication in the rule. In effect, Slack is asking this Court to ignore the basic rules of grammar and statutory construction in order to read something into Rule 9(b) that is simply not there.

Rule 9(b) was based on this Court's decision in *Sanders* and the distinction that *Sanders* made between successive petitions containing the same claims, after an adjudication on the merits, and successive petitions alleging new claims which did not follow an adjudication on the merits. Had Congress intended to require a prior adjudication



on the merits before the abuse of the writ doctrine was applicable it would have said so. Notwithstanding Slack's rather creative reasoning, he has offered no support for his argument that the qualifying phrase "and the prior determination was on the merits" applies to both the phrase immediately antecedent to it and to the phrase following it.

Slack next argues that the decision in *Farmer* ignores the principle that a statute must be interpreted in light of the harm it was meant to address. According to Slack the *Farmer* court's reading of Rule 9(b) would apply in situations in which there is not conduct on the part of the petitioner that could be described as abusive. Slack then lists examples of such behavior like deliberately withholding a claim and forum shopping.

Slack's argument ignores this Court's decision in *McCleskey v. Zant*, 499 U.S. 467 (1991). In *McCleskeyy* this Court stated:

> [A] petitioner may abuse the writ by failing to raise a claim through inexcusable neglect. Our recent decisions confirm that a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice.

*Id.* at 489.

In this case, the claims the federal district court dismissed as abusive alleged the following:

> 2. Petitioner was denied his right to due process under the Fifth and Fourteenth Amendment because he was charged with "open murder" in an information which did not properly plead each element of first degree murder thus failing to impart sufficient notice to him.
>
> 4(c) The trial court failed to properly instruct the jury in that the malice aforethought instruction was unconstitutional.
>
> 5. Ineffective assistance of counsel for: a) failing to take any action to prevent the introduction of evidence of sexual contact between Slack and his twelve year old victim; b) failure to object to the jury instruction on reasonable doubt; c) failure to object to the jury instruction on premeditation and deliberation; d) failure to object to the jury instruction on malice aforethought; and e) failure to investigate the facts of the case and develop available defenses.
>
> 6. Ineffective assistance of appellate counsel for: a) failing to challenge the information charging him with open murder and the malice aforethought instruction on appeal; and b) conceding two of the four issues raised in his direct appeal.
>
> 7. The doctrine of cumulative error mandates relief.

JA 71-89, 155-156.



Every one of these claims is apparent from the state court record. There is no reason why Slack could not have raised these claims in his original federal petition. In fact, in his original federal petition Slack challenged his reasonable doubt instruction and the instruction on premeditation. JA 12-13. He could have just as easily challenged the instruction regarding malice aforethought. The same could be said for Slack's ineffective assistance of counsel claims for failing to object to the jury instructions. If Slack could challenge two of the jury instructions in his first federal petition why could he not also challenge his trial counsel's failure to object to the instructions? In addition, Slack challenged the trial court's admission of evidence regarding his sexual relationship with his twelve year old victim yet he did not challenge his trial counsel's failure to prevent the admission of this evidence. All of the claims dismissed as abusive could have been raised in Slack's first federal petition. Slack's failure to do so constitutes an abuse of the writ.

Slack next alleges that applying the abuse of the writ doctrine following a dismissal without prejudice "imposes enormous consequences on the basis of a distinction that simply will not bear the load." (Opening Brief, pg. 40.) According to Slack:

> Before his initial petition was dismissed without prejudice, Mr. Slack informed the

> federal district court that there were additional unexhausted claims outside the petition that he wanted to assert; and solely because those claims were not included in the dismissed and superseded initial petition, those claims were subjected to the Ninth Circuit's preclusion rule. If the unexhausted claims had been pleaded in the dismissed petition rather than drawn to the court's attention by motion, apparently the Ninth Circuit rule would not preclude their consideration; but there is no rational distinction between the two situations in terms of the burden on the federal court or the effect of the dismissal of a petition without prejudice that would justify so drastic a difference in treatment.

*Id.*

This entire passage is a complete misrepresentation of the record. None of the claims that Slack raised in his motion to hold in abeyance in his first federal proceeding were dismissed as abusive. *See* JA 17-19, 152-156. In fact, not one of the claims Slack raised in his Motion to Stay These Habeas Proceedings was included by his counsel in his amended petition which was the subject of the federal district courts dismissal order. *See* JA 17-19, 66-91. All of the claims that were dismissed as abusive appeared for the very first time in the third amended petition filed by Slack's counsel in his second federal proceeding. Slack is attempting to create a "distinction" that simply does not exist in this record.



Applying the abuse of the writ doctrine to a petition following a dismissal without prejudice will not "irrationally compromise the effectiveness of the state exhaustion proceedings." (Opening Brief, pg. 40). According to Slack, if a petitioner obtains a dismissal without prejudice and returns to state court and discovers additional, previously unknown claims, he would be precluded from raising them in his second federal proceeding. Slack's argument ignores the fact that abuse of the writ may be overcome by a showing of cause and prejudice. If a petitioner can demonstrate cause and prejudice for failing to discover the new claims earlier he may proceed in federal court.

Further, in this case Slack did not return to state court and "discover" his new claims. In fact, these claims were not "discovered" until Slack's counsel filed his amended petition in his second federal proceeding. As noted above, the basis for all of Slack's claims was apparent in the record of his state court proceeding. There is simply no reason why these claims could not have been raised in Slack's first federal habeas proceeding.

Slack next argues that applying the abuse of the writ doctrine to a petition following a prior dismissal without prejudice would result in the suspension of the writ of habeas

corpus in violation of Article I, Section 9 of the Constitution. Slack's argument has no merit.

In *Felker v. Turpin*, 518 U.S. 651 (1996), this Court discussed the suspension of the writ of habeas corpus in the context of the AEDPA, stating:

> The Act also codifies some of the pre-existing limits on successive petitions, and further restricts the availability of relief to habeas petitioners. But we have long recognized that "the power to award the writ by any of the courts of the United States, must be given by written law," *Ex Parte Bollman*, 4 Cranch 75, 94, 2 L.Ed. 554 (1807), and we have likewise recognized that judgments about the proper scope of the writ are "normally for Congress to make." *Lonchar v. Thomas*, 517 U.S. 314, ---, 116 S.Ct. 1293, 1298, 134 L.Ed.2d 440 (1996).

*Id.* at 664.

In enacting Rule 9(b) Congress created legitimate limitations on state prisoners who challenge their convictions in federal court. The application of the abuse of the writ doctrine to successive petitions following a dismissal without prejudice does not create an unconstitutional suspension of the writ of habeas corpus any more than the application of any procedural bars to such a petition.

Slack next lists situations which he argues could occur under the AEDPA if the abuse of the writ bar is applied to



petitions filed after a dismissal without prejudice. Slack's arguments center around 28 U.S.C. §2244 as amended by the AEDPA. This statute does not govern Slack's petition and the issues Slack raises are not before this Court. Slack is attempting to cloud the issue before this Court by creating possible situations under the AEDPA. Regardless of whether any of these situations would occur under the AEDPA, none of them apply to this case and the scenarios Slack raises are not currently before this Court

There is nothing in the statutes, rules or caselaw governing federal habeas corpus review of state court convictions which allows a state prisoner to return to federal court time and again with new unexhausted claims. Slack is not entitled to as many dismissals without prejudice as he wants. Slack's amended petition was abusive within the plain meaning of Rule 9(b). The district court properly dismissed it because of that failing.

**E. A Federal District Court's Authority to Fashion Rules Governing the Cases Before Them Does Not Trump Settled Federal Habeas Corpus Law.**

Finally, Slack argues that the application the abuse of the writ doctrine to petitions such as his is not necessary because the federal district courts can prevent multiple filings of petitions containing unexhausted claims. According to

Slack, the federal district courts may issue an order dismissing a petition without prejudice and make it a condition that any later petition must not contain unexhausted claims absent extraordinary circumstances, or summarily deny claims that are obviously without merit.

Slack seems to be arguing that the already overburdened federal district courts should accept the burden of policing habeas corpus petitions for any defenses that the respondent would ordinarily be required to raise. What if a petitioner, who has in place an order directing that only exhausted claims may be raised in a subsequent federal proceeding, would be able to demonstrate cause and prejudice to raise new claims and therefore overcome an abuse of the writ bar? Is the cause and prejudice standard a higher or lower standard than Slack's "absent extraordinary circumstances?" What exactly are "extraordinary circumstances?" This Court has specifically set forth the requirements to overcome abuse of the writ. *McCleskey v. Zant*, 499 U.S. 467 (1991). Slack now apparently wishes to create more years of litigation to determine the guidelines for "extraordinary circumstances."

Further, Slack's first federal petition was dismissed expressly in order for him to exhaust his state court remedies. JA 21-22. Rather than doing so, Slack returned to federal court with brand new unexhausted claims. There is no



indication that Slack or his lawyer would have been any more compliant if the federal district court had specifically told Slack that he could not raise any unexhausted claims in his second federal petition.[8] No doubt Slack, and any other petitioner, would attempt to circumvent any order issued by the federal district court under Slack's various scenarios. Contrary to Slack's contention, there would be no reduction in the amount of filings directed at the state respondents and the federal district courts.

Slack is, in effect, arguing that the federal district courts can disregard the law, as set forth by this Court, the Circuit Courts and Congress, because the courts could fashion prophylactic rules that could theoretically achieve the same results. This argument is absurd and should be disregarded by this Court.

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[8] Respondents would note that the same counsel that represented Farmer in the filing of his third federal petition, consisting of unexhausted claims, now represents Slack and filed his third amended petition containing unexhausted claims. See *Farmer v. McDaniel*, 98 F.3d 1548, 1549 *cert. denied* (9th Cir. 1996). Farmer was specifically told to raise all claims in his second federal proceeding or risk having omitted claims barred under abuse of the writ. *Id.* at 1550. This order did not prevent Slack's current counsel from filing a third federal habeas corpus proceeding on Farmer's behalf raising new, unexhausted claims.

## V. CONCLUSION

The federal district court properly dismissed grounds two, four(c), five, six and seven of Slack's habeas corpus petition as an abuse of the writ. The federal district court's decision should be affirmed by this Court.

Respectfully submitted

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